CHAPTER II

PROPERTY RIGHTS AND ITS THEORITICAL UNDERPINNINGS

INTRODUCTION

The notion of theory of property rights has undergone myriad changes ranging from how it was in the hunter-gatherer period to the present modern technical system. With this evolution of human roles, the concept of property rights also has been affected on the ground of common and private. The concept of property rights is not immutable or fixed, its wide influence can be seen in the realm of socio-political, cultural and economic spheres. Western attitude towards the development of capitalism left a remarkable picture that can be experienced by the whole world, not only indigenous people. So, it has become a debatable issue regarding the changing concept of property rights between the western (who sees property as the financial security) and the indigenous people whose attitudes limited within the land alienation.

The discourse of property rights and its theoretical understanding has become very crucial in order to locate oneself within the domain of the changing system. This chapter tries to analyse the patriarchal system that operates in society and its effect on women’s property rights. The research question that the study try to answer is—how do various theoretical underpinnings of property rights empower women in economic and socio-political areas. In this context, the research deals with the evolutionary theories of property rights that range from varied schools of thought liberal to Marxists—that have contributed in this landscape: which helps to locate the peculiarities of property rights.

2.1 HISTORICAL EVOLUTION OF PROPERTY RIGHTS

Simply put, property defines as a thing whereas in legal aspect, it means rights. Hence, property rights may be defined as claims upon certain objects, which refer to one’s right to transfer or dispose or exclude other from occupancy. It enhances liberty of an individual, for instance, if A owns an apple, then A is generally entitled to prevent others from eating it. On the other hand, the second component of property is the right to
transfer the holder’s property rights to others (Sprankling, 1999, 5). The subject of possession and ownership has different treatment and each receives separate treatment of law. Immovable property such as land, building, etc. has their own set of law and forests; trees have a separate set of law. Land is a natural resource and is impossible to expand: it has become very crucial for human being sustenance. Similarly, movable properties which include immaterial properties like actionable, mortgage, leases etc., have different sets of laws (Hidayatullah, 1983). Books, copy-rights, inventions and artistic creations come under the category of incorporeal or intangible property (Chandra, 2010).

In this context, the question can be revolved around the evolution of property rights, in early period. The material side of human civilisation was mainly engaged with the idea of property and ownership. Growth of civilisation turned towards legal ownership, and the concept of property became an important part of evolution of civilisation (Mahajan, 1988, 389). Originally, the world belonged to no one but was open for the first taking by anyone (Tully, 1979, 125), ownership was absent in the primitive society. Primitive society property rights were de facto, not de jure (Krier, 2009, 144). Human evolution can be traced in different stages such as Stone Age followed by, the Copper Age, Bronze and Iron Age. In early history, human beings were known as nomads along with the family that composed of man, woman and their children. They lived as hunters and gatherers without permanent settlement (Daimond, 2004). Their main occupation was to find food because they had not yet learnt how to plant tree, sows crops or domesticate animals (Hidayatullah, 1983, 16).

Property is instinctive in human nature as well as in animals, for instance, a dog finding a bone considers it as his own and fights another dog over it (ibid 12). If a primitive man hunted and gathered food for family without understanding the concept of property, that would be considered as private property, because he wouldn’t share it with other families (ibid). Land resources were regarded as communal because the society was engaged in collecting food and tools. As time passed, society grew and land system also changed from communal to individual ownership, due to agricultural activities. The emergence and spread of agriculture led to the growth of population, and appropriation of land gradually became exclusive and permanent (Mahajan, 1988, 389). They
domesticated animals, and the construction of thatched cottages also came into existence for the settlement. Ownership and possession were guided by their own customs and norms, instead of fixed rules (Hidayatullah, 1983, 18). Things could be exchanged through barter system in order to fulfill requirements.

The possession and ownership of property took the form of rights of an individual and it became the responsibility of the state to take care of it. Gradually, the society realised the importance of the government for the protection of individual’s rights, and in this context: Blackstone rightly declared that “Government existed for the protection of its citizens’.

In order to understand the different phases of human civilisation, their earlier historical background appears to be very significant. Historians, archeologists, anthropologists, etc., have ample information on human evolution. Biblical interpretation describes Adam and Eve as the progenitors. Hinduism believes that three gods—Bhrama created the universe, Visnu sustains the creation and Shiva destroys the evil. Bhrama created human beings from his own soul¹ and for that, it is believed that humans are the strongest animals in the earth. The Chinese believed that the world originated only in the 3rd or 4th century A.D. and it began when two powers Yin and Yang that came out of Chaos and brought forth a man named P’ and Ku, who made the universe out of Chaos and got absorbed in the earth, the heavens and the universe (Nourse, 1943).

Gradually, human civilisation gave birth to different clans and tribes. They emerged with simple social groups and formed nations, in which many tribes and clans came together and formed a single community. The division of class and caste was also came into existence and feudal system further encouraged the ownership of property in the fewer hands. Society embraced modernity with legal formulation in safe-guarding individual rights. Similarly, the notion of common property ownership was slowly overridden by private ownership, in terms of legal approach. In modern epoch, clans and tribes rarely practiced communal ownership of property. In tribal society, the customs of

ownership also passed from one generation to another, for example, in Fiji, the natives have a communal title of inalienable land system (Lea, 2008, 164). The people of Fiji think that land belonged to God and that’s why no one can own land as God. The clans who own the land and landowners supervise it. Bodyell and Shah have analysed that the reason behind the burgeoning of capitalism in west and failure in other parts, refer to individual ownership of land: title of the land in west can be used as an economic security against financial crises.

Similarly, in India, the joint family system comes under the Mitakshara and Dayabhaga laws of ownership of property that devolves into the family, especially male members (Mohsin, 2010, 109). In the matriarchal system, in some parts of South India, property belongs to the youngest-daughter (Agarwal, 1996a). These examples clearly show the evolution of property ownership from primitive society to modern civilised system. As well as, women’s property ownership was also affected and in most of the societies they were deprived from the property rights. Engels states that primitive society was egalitarian in nature and was based on communal ownership of property with collective production.

2.1.1. CONCEPTUAL ANALYSIS

This section deals with concept and development of property laws in three major areas such as Greek, Romano-Germanic and Common Law. This part also outlines the practice of inheritance of property rights in different laws and its impact upon women.

2.1.1.1. GREEK LAWS

Greek inheritance law is regulated by the Greek civil code, under Article 1710-2035 (Kosmidis & Partner Law firm). Greek Civil Code is taken from the Roman law and it has also influences of the German Civil Code (the German Civil Code is also descends from Roman and ancient German law) (Mattheou). Before the introduction of Greek civil

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2 For example, Hindu women in ancient and medieval period did not enjoy inheritance of property rights, only after the Hindu, Women’s Right to Property Act, 1937, Hindu Succession Act, 1957 (Amendment 2005), they are enjoying equal rights with their male members in India.
code (i.e., until 1046), the science of law of the Pandects had also practiced property law (ibid).

In Greece, the institution of ownership was protected under the Constitution of 1957, and it was revised in the years of 1986 and 2001. Under Article 17 of the Greek Constitution, that ownership of property is protected by the state, and the rights derived from it may not be used against public interest. It is clear from the Article that nobody can be dispossessed of individual property except for public purpose which has been implemented by law. So, the Greek Constitution have limitations on the ground of ownership of rights, concerning public interest. If any case of limitation occurs, then the owner of a real estate will receive a reasonable indemnification which is imposed by court (Mattheou).

Deceased intestate property is inherited by the children and grandchildren who come under the first class category. If the deceased person has no any first class heir, then property can be inherited by a close relative, who comes under the second and third category. The early Greek society was patrilineal and patriarchal where the father was supreme in the household by customs and later by law (Pomeroy et al., 2004, 15). They did not recognise the right of the firstborn and children usually inherited equally, daughters often inherited land, but often received their share of movable property as a dowry (Caseau and Sabine, 2014). Widows were not allowed to inherit property from their husbands but were granted a lifelong usufruct rights in the family (ibid).

Ancient Greek ideology was built upon male dominance where women did not inherit or own property (Foxhall, 1989; Blundell, 1995: Johnstone, 2003; Pomeroy et al., 2004; Fleck and Hanssen, 2007). In most of the Greek societies, women accessed little education facilities, and faced restriction. For example, Athenian women were restricted by law from entering into a contract. By contrast, the Spartan women follow a different strategy, they have unique inheritance laws for women in which they could own and

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inherit the property. Spartan daughters could inherit all the property if they had no living brothers in the family: they were better educated and moved freely in the society (Fleck and Hanssen, 2007; Pomeroy et al., 2004). Spartans were totalitarian in nature and Athens’ customs were based on a democratic governing system, though they shared common heritage (Rehmke, 1997).

2.1.1.2. ROMANO-GERMANIC LAWS

Romano-Germanic law, also called civil law or Roman law, the law of continental Europe was based on an admixture of Roman, Germanic, ecclesiastical, feudal, commercial and customary laws (Carrozz). This law was adopted in Latin America, Asia and Africa. In the later part of the 20th and 21st century, civil laws systems underwent substantial modification in many areas for instance, transformation in family law which was based on patriarchal system (ibid). It was originated in Europe in 12th century. The concepts begin with the Corpus Juris Civilis (body of law) which was the compilation code of Emperor Justinian. Roman laws emerged as the systematised legal law and its importance is still relevant in present phase. Nichols’s work, An Introduction to Roman Law, states that Roman law spread in almost the whole of Europe, as a common stock of legal ideas.

Nicholas states that during the formation of law, there were no professional judges, the interpretation of law was expressed by the priestly ‘college of pontifices’ and jurists. It has been argued that when Justinian became emperor then only law was come into existence. The Twelve Tables (Couperus, 1990) was a written law and another main source of Roman law. On the other hand, Juris Prudentes were helped by Praetors who interpreted the Twelve Tables and other laws and such interpretation became the sources of law. India also shared the same experience where pundits and mulvis were considered as the main sources of laws.

Roman society at first was divided into two distinct bodies, the populus and the plebs, the former possessed political and better rights than the latter were settlers from outside (Hidayatullah, 1983, 59). Household head, known as the paterfamilias meaning
‘father of a family or household,’ possessed an authority in the family (Thompson, 2006, 2). This shows the power and responsibilities regarding rights over household property and other religious activities have been looked after by the head of the family.

In ancient period, Roman law gave no preference to primogeniture. If the father died, his intestate property was inherited equally among children, but later on, such laws were modified and preference of inheritance was given to the eldest son and the priority to male members (Treggiari, 1979, 68). Though, in Roman law, both sons and daughters inherited property, yet sons—enjoyed more than daughters. In fact, Roman women in ancient period did not own property, like the women of classical Athens and elsewhere in Greece (Sparta and Gortyn excepted) (Lemmer, 2006; Flick and Hanssen, 2007), did not enjoy political rights (Couperus, 1990, 15). Under ancient Roman law, women were generally under the wing of their husbands (Robinson, 1987 cited by Zaher, 2002, 460). Widow and unmarried women could own property, but only for a life-time.

Susan Treggiari expounds in her article, ‘Sentiment and Property: Some Roman Attitudes,’ that Romans had not seen land and slaves in a commercial ways, which would be sold and bought, because they were emotionally attached with them. In ancient Athens and Rome, slaves including men and women who had no legal rights, were merely considered as an item of property (Palmer, 2014, 6). They were treated as the property of the masters.

2.1.1.3. ANGLO-SAXON AND COMMON LAWS

Anglo-Saxon laws were very popular in Britain before the Norman’s Conquest in 1066. This system was crucial, especially in tribal society, in which magic and ritual played significant role than scientific reasons (D’Amato and Stephen). Later on, most of the rules and regulation of Common law of England were taken from Anglo-Saxon laws.

Common law is also called Anglo-American law, the body of customary law (Glendon). Common law mainly belonged to the law of England which emerged during

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the Middle Ages and it can also apply to other countries, whose laws have been modeled on the bases of English law. In fact, the Common law is a legal system of most of the English-speaking countries. The origin of Common law refers to the royal power: it was mainly established in order to maintain peace instead of giving moral justification to social order (Mohsin, 2010, 195). It was basically un-codified, which means that there were no legal rules and statutes. The influence of Common law can be seen in many colonised countries, for instance, South Asian Counties like India and Bangladesh. The English common law provides substantive evidence in favour of property rights, for example, William Blackstone in his *Commentaries on the Laws of England*, included property rights as one of the absolute rights (Clark, 1982, 120).

England was retained by Common Law and these Common Laws were influenced by the principles of Roman Laws. Common law was regulated by real property in the inheritance system, deceased intestate property: that is passed on to the eldest son and in the absence of sons, goes to daughters who inherit jointly in the family (Erickson, 1993, 26). Practically, most of the fathers, favoured sons over daughters, in the distribution of land and daughters enjoyed only movable properties.

2.1.2 PROPERTY RIGHTS: NOTION

The notion of property rights undergoes various socio-economic, political and cultural aspects. Generally, property is related with the access of natural resources including land and other materials, in order to fulfill the human needs. Individuals could own property through the means of inheritance, gift or self-acquisition by buying from others. In this context, philosophers have interestingly given justification of property rights. Modern philosophers are more inclined towards ownership of private property, contesting with the notion of common property, and are demanding more space within the domain of liberal world view (Chandra, 2010).

Renaissance period gave flame of individual’s rights to property. The seed of property as natural rights can be found in Glories Revolution of 1688 in England (Phillips, 2008). During enlightenment period, many social conditions improved, the
struggle for the right to life, freedom of religion, opinion and property rights also emerged. Consequently, it broke the back of feudal regimes and transformed humankind’s prospects in realising the human rights. The ideas of enlightenment played a significant role in inspiring French Revolution.

Enlightenment, also known as Age of Reason, became popular in late seventeenth and early eighteenth century, where many thinkers also contributed towards the concept of property. Thinkers like, Hobbes, Locke, Rousseau, Adam Smith, and Immanuel Kant were influenced by this period (Whitaker, 2014). For instance, Thomas Hobbes argued that private property was the creation of government power and says that there could be no property without government. State was created for the security of man’s property. On the contrary, he committed himself to the view that in the state of nature there was no property, no distinction of mine and thine, so there is nothing to be said for explaining subordination, a species of transfer of ownership (Ryan, 2002b, 228). Paradoxically, in Leviathan, he identified the right to property solely with the power to take possession over things and protect them from being taken by others (Rubin and Klumpp, 2011, 5). On Hegalian approach, basic human interest owes property which contributes immensely to the ethical development of the individual (Waldron, 1988, 3).

French Revolutionaries recognised property rights under Article 17 of the Declaration of the Rights of Man and the Citizen, in which it was asserted that ‘since property is an inviolable and sacred right, no individual may be deprived of it unless some public necessity, legally certified as such, clearly requires it; and subject always to a just and previously determined compensation’. If anyone violates, people can legally claim their right. But this rights excluded women from political participation, in this regard French philosopher the Marquis de Condorcet (1743-1794) and Etta Palm d’Alders, they wrote a Declaration of the Rights of Women in 1791, demanded equal natural rights (Ishay, 2008, 110).

Edmund Burke states that, the power of perpetuating our property in our families is one of the most valuable and interesting circumstances which tends to be the “perpetuation of society itself” (Harvard Classics, 1909). Similarly, Makintosh says that
“property is the sheet-anchor of the society”⁶ which means, it plays a significant role in chaos situation. Jeremy Waldron’s article, *Property, Honesty, and Normative Resilience*, explores the relation between property and honesty. In order to be honest, an individual should respect the rule of property law (Waldron, 2001, 10). Further, to steal is opposed to honesty, which violates the rule of property, but in some of the legal systems it would be neither dishonest nor wrong.

C.B Macpherson’s article ‘*Property as means or End*’, meticulous elaboration has been done, regarding property rights on whether it is a means or an end, in order to achieve human happiness. He argues that most of the philosophers have stressed upon it is means to achieve the end itself, and conversely theorists, like Hobbes and Bentham, invoked accumulation of property as an end itself, which can help in achieving universal happiness (Macpherson, 1979).

According to Rousseau, the origin of property and family have four consequences – (i) competition (ii) self-comparison with other (iii) hatred, and (4) urge for power, great institution of inequality was private property (Vermani, 2012, 96). Paradoxically, property to Rousseau was considered as the most sacred right of all citizens and quite indispensable social right. Property right gave birth to the concept of materialist, self-interest and human ego among human beings. For Rousseau, only a limited right is justifiable.

The first justification of limited property right is to develop from the original means of producing property from a piece of land, and this possession must be taken by labour for cultivation (ibid, 101). Another justification for property as limited right was that it was consistent with the sovereignty of the general will where individuals needed to surrender life, liberty and the estate (MacAdam, 1979, 194). A truly democratic society is a society which would be governed by the general will. Property, in this sense, then becomes a legal right, given the identification of law, sovereignty and the general will.

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Under these conditions, changes become apparent that private belongings are protected by the common force of the state (ibid).

During the 19th century, the term ‘property rights’ is used to refer as “bundle of rights” in the work of John R. Common, The Distribution of Wealth (1893) and Ronal Coase (Schmdtz, 2012; Pound, 1939; Claeys, 2012; Alston and Mueller, 2015). Prior 1883, property was understood as entailing to absolute rights upon a thing owned, for instance, Roman laws and Blackstone (Klein and Robinson, 2011). Bundle of rights also refers to bundle of sticks where each stick represents the rights of benefits and some important sticks of landowners which include—right to sell, mortgage, lease, donate, etc. Bundle of rights between two or three parties is considered as a transaction process that also fascinated the idea of democracy and capitalism. So, land is also a part of bundle of rights: it can be accessed through inheritance, acquired from others or bequeath parents.

2.1.3. COMMON AND PRIVATE PROPERTY RIGHTS

This part devolves into the basic concept of common versus private property rights.

2.1.3.1. COMMON

According to Harold Demsetz, common ownership means a “right which can be exercised by all members of the community” (Demsetz, 1967, 354). It denies interference of state or any other individual, upon the communally-owned property. For instance, grazing of public land or fishery in open seas is considered as common property. Richard Posner shows that, in some circumstances, common property could be optimal (Alston and Mueller, 2015, 2259) and that it gives some kind of unity in society, where each individual enjoys the same fruits of the common property.

Further, Terry Anderson and Peter J. Hill showed that the process through which resources are “turned into private property can often lead to rent dissipation” (cited by Lee Alston and Bernardo, 2015). The natural recourses need to face the cries of fragmentation, for instance, the process of land fragmentation among indigenous people. Martin Bailey provides anthropological evidence from aboriginal societies that “resource
scarcity does not inevitably lead to private property”. The common ownership of natural resources among the indigenous would generate social relations and individual needs will fulfill with the help from others.

The common property flourished in the work of Marx, “property” is the means of creation of human relations to his nature. If human owned private property, then would alienated one from social bondings and create conditions of individual isolation. Following Marx, Hunt claims that “private property estranges men from his true identity as social being” (Hunt, 1979, 182). Private appropriation would destroy social bases of production, which can be owned for a common purpose. Marx was the only theorist who critically examined those aspects of property relations which are general (i.e. common to all societies) and those which are specific to capitalism (ibid, 283).

The notion of property rights can be incomplete without un-touching the contribution of Plato, considered as classical thinkers. Plato preferred common ownership of property, in his ideal state land to-be owned by farmers privately, because they need to produce for guardians’ class. As in guardian class, production can be consumed in a common manner. Plato’s expression towards guardian class is defined in terms of, ‘friends have all things in common’ (Okin, 1979a, 31). This shows that Plato’s concept of common-ownership, however, it only applies to guardian class, while artisans are allow to possession of their private property (Sabine and Thorson, 1973, 66). Plato’s main aim to produce the greatest degree of unity in the state, and private property is incompatible in his state of nature. The ownership of private property for guardian class would obscure them from reasoning and would hamper smooth functioning of the state (Vermani, 2012, 85). Communism of Plato consists of two elements: abolition of private property and abolition of family because it inculcates corruption and family enlarges nepotism in the society.

7 Plato’s ideal state, consisted with three classes: philosophers, soldiers and artisans, philosophers ascribed as the rulers who can govern the society, soldiers who will protect, and artisans or farmers are the producer. The guardian class consists with rulers and warriors however; ownership of property cannot be allowed them.
Ownership of private property promotes virtues like “responsibility, prudence and self-reliance,” it gives place to stand in the world, and such rights define individual’s confident or freedom and would be recognised and respected by the world (Waldron, 1988, 22). Further, it gives freedom to access control over private natural resources on the bases of necessary conditions of human development. Hegel’s *Philosophy of Right*, also shared same experienced that individual control over natural resources is a necessary condition of human development. As Harold Demsetz noted, a property owner who owns property indefinitely will optically maximise its value over and in time, rather than exploit it for short-term gain (Demsetz, 1967). In contrast, individual rights, where each member of the community is entitled to a separate resource packet, to the exclusion of other members, concentrates costs and benefits and thus creates constructive incentives (Krier, 2009, 141). Private owners have the right to exclude non owners, but the right to exclude is a feature of property rights in general, rather than the defining feature of private ownership in particular (Merrill, 1998).

“Ownership has nothing in common with possession” (Daube, 1979, 44), it gives clear distinction that the notion of private ownership, incompatible in the world of common-ship. Individuals’ ownership incurred the idea of absolute power over objects or things and such rights should be respect in the moral and rational basis under the supervision of government legitimacy. The concept of legal absolute power of an individual was the main principle of Roman law (ibid, 37). Absolute ownership prefers prevention of waste, it ensure that property should be cared for properly, or at least not wasted (Aristotle, politics, Book II, Section 5-6). Private ownership enables the owner to sell the whole property or else transfer to any other, for necessary purpose (Mccffery, 2001).

Aristotle’s *Politics* Book Two, elaborates “proper system of property for citizens who are to live under an ideal constitution” (Barker, 2009), and the critical examination in the system of communism. By criticising “common ownership” of Plato (Mathie, 1979, 25), difficulties especially in land ownership, there would be a conflict situation
among the workers, regarding their reward because, those who work less and those who work hard also get the same recompense of their labour (Waldron, 1988, 6). When a resource is held in common, any commoner who exploits the resource gains all the benefits of doing so for himself, whereas the cost-spills over onto everybody (Krier, 2009, 141).

So, Aristotle suggests if each person has their own plot, then they would get their reward independently. He preferred the concept of private ownership of property where each individual owns a separate property, for there would be less possibility of quarrels. Private property is inextricably linked a defense to the separate (Mathie, 1979, 15). At the same time, he also favoured the communal use of resources, by imposing tax on rich people (Waldron, 1988, 7). The notion of private property is inextricably linked with the justification of separate spheres of interest or household in the society (Mathie, 1979; Waldron, 1988). The essence of private property is to exclude others on the bases of law of property, which belong to individuals, such as house, land, food, etc. (Cohen, 1927, 12). Private ownership of property is recognised a some kind of sovereignty: such issues can be traced to the original discoverer or occupant which is dominated from Roman jurists and modern philosophers, from Grotius to Kant (ibid 15).

Phoudhan thought that exclusive ownership of property is considered as theft in nature (Proudhan, 1840). In a sense, that property was a right of an alien and if an alien dies then his property would be owned by a ruler or state: this condition also applies to individual. When property takes the shape of profit, interest, rents, etc., which can be earned without any labour, it becomes theft. Marxists thinkers criticise private property on the ground of class conflict. Private ownership creates conflict situation among the working class as a proletariats and property owning classes, on the ground that it deprives workers from their labour (Rubin and Klumpp, 2011, 5). Further, its major obstacle is attainment of welfare, maximisation, thus, common ownership would be the optimal in this condition.
2.1.4. COMMODIFICATION OF VALUE

The ancient view of property literally opposes the modern, because idea of modern property is associated with capitalism and also shared some elements of socialism (Pocock, 1979, 143). Primitive concept of property, recognised as barter system—exchanging the goods was replaced by the advent of economic structure (especially currency or money in exchanging things). On the other hand, this capitalism system put a fuel on individualisation. Professor Parel states that, “money had a constant tendency to substitute itself for beatitude” (ibid, 141). In ancient city state, nor commerce, nor agricultural activities were developed. It has been mentioned in western theory of four states of human history: that men were first hunters, then shepherds, formers and finally merchants (Meek, 1976).

As well as, the Financial Revolution witnessed the rise of commercial activities and financial services. On the later stage, The Industrial Revolution also changed the scenario of property, which gave rise to commercialisation. The eighteenth century perception about “commercial society” was not based in the first instance of the perception of trade (Pocock, 1979, 145). It was only after the late 18th and early 19th centuries that revolutionary changes took place because of the production capacity of many countries such as England, United States and other European countries that encouraged trade system.

Further, changing property rules “can resituate people in positions that allow them greater freedom” (P Law, 1993-1994), so, this freedom of choice also enhance the notion of individual ownership of property. So how did ownership of land rights emerge among the aboriginals? In this context, Harold Demsetz interestingly illustrated an example of the Native American tribes who inhabit Labrador Peninsula, Quebec (Demetz, 1967, 351). In ancient period among the tribes, hunting was primarily practiced for the purpose of food and few furs for the family. Private land rights was absent and hunting was

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practiced in an open manner, but when commercial “fur trade” was developed by European settlers, it led to the demand of allocation of private hunting territory.

The demand for furs increased hunting practices and finally created the situation of scarcity, so tribes started private hunting territories that were allocated for individual families, so that no one could interfere into another’s territory (ibid, 352). Pocock has also cited from Gibbon’s *Decline and Fall*, in which he elaborates the primitive Germans. German tribes were “pre-agricultural and illiterate; consequently they lacked money and letters, the two principal means of communication by which goods and information are exchanged within more civilised societies” (Pocock, 1979, 156). He also indicated that agriculture in historical perspective called as “the useful parent of the arts,” is seen rather as a necessary pre-condition of commerce, than a stage of society existing in its own right (ibid).

During globalisation property took different shapes with the advent of multilateralism, in which commercialisation of land was encouraged for the purpose of industry. With the growing commercialisation in agricultural activities, state government initiated agrarian land reforms (Velayudhan, 2014, 88). Private property ownership for market exchange in developing countries also impacted upon customary system, along with forced removal of communities (Forsythe et al. 2015, 7). Hayek argues that “commoditisation of property to its maximum extent is a necessary for individuals to pursue their own ends and in so doing, to pursue individual liberty” (Chandra, 2010, 24).

Private property is significant in this era and human societies cannot be imagined without ownership of private property that satisfies basic needs and condition. On the other side, property brings powers: the power of masters over servants, the power of masters over themselves (Pocock, 1979, 144). Hence, large accumulation of property also leads to corruption (Ryan, 1984a, 49). It creates the situation of corruption, in a sense that market exploitation by rich people and poor would not get chance to flourish their skills and development.
2.2 PERSPECTIVES ON PROPERTY RIGHTS

This section deals with perspectives of property rights from different approach such as liberal, libertarian, utilitarian and Marxian. Liberal perspective is represented classically by John Locke. A utilitarian perspective is—basically associated with the idea of Jeremy Bentham by defending property, is the source of happiness and Marxian incline towards communal ownership of property.

2.2.1. LIBERAL

Classical liberalism was propounded by John Locke (1689-1755), Baron de Montesquieu (1689-1755), Adam Smith (1723-90), Thomas Paine (1739-1809), and others in 17th and 18th centuries. This theory holds that free society and private ownership of property rights goes hand-in-hand in the society. Such ideas focus on individual freedom and rights from the community traditions. Edmund Burke (1729-97) was also a classical liberalist thinker. Under classical liberalism, the legitimacy of the state is based on the claim that it has limited moral authority to defend or to protect life, liberty and property (Fox, 2012, 14). Rights, including property rights, are inalienable. People can exchange items of property in a classical liberal world, but a classical liberal cannot consistently talk about people exchanging rights (ibid). Private property defines the spatial boundaries within which an individual can legitimately exercise his right of action.

Classical liberals maintain that rights, including property rights, are pre-political, meaning that they exist prior to the independence of the state. They viewed; citizens form governments in order to protect their rights in the state of nature. Classical liberalism is intertwined with natural law and it derives its sources from theological aspects. The primary differentiating characteristic of classical liberalism, relative to modern libertarianism, is the role of theological reasoning that is generally employed by classical liberals (Fox, 2012).

Locke endeavours to locate his idea on the basis of natural rights, right to live, liberties and estate and among them right to property is most prominent one. Individual possessed such rights by nature and it is not merely based on the arbitrary ruler (Ryan,
1984a, 15). As Locke, known as individualist and in the state of nature non-interference policy would be applied from the other without the prior consent of the owner. Locke’s *Second Treaties*, explains the theory of mixing one’s labour with a piece of land and made fruitful. In state of nature, right to property was given by nature to mankind in common and it needs to be preserved for their purpose (ibid, 16). Such properties must be respected by the government for individual purpose (Waldron, 1988, 3-4). On the other hand, the role of the government is to protect individual’s basic rights. Locke firmly says that men who have no property may be governed despotically; they have no rights and are to be governed arbitrarily and absolutely (Ryan, 1984a, 20).

Locke’s theory was criticised by James Tully, who demonstrates that an individual has no right to individualise property, because it is given to mankind by nature, in common form. All men have the common right and use over all things which has been provided by nature, but at the same time they have been debarred from private property within that domain (Tully, 1979, 123). Robert Nozick played a large role in reviving interest in Locke’s views on property (Munzer, 2001, 2). By criticising Locke’s mixing one’s labour with something and to be owner, he illustrated, “spill of tomato juice in the sea, by thinking to own whole sea”. This meant that an individual cannot own the whole sea, so it is foolish to spill tomato juice into it (Nozick, 1974, 174-75).

Famous contemporary evidence of this liberal thinking is to be found in John Rawls’ *Theory of Justice* in which, principle of justice is remarked as important in understanding property rights. The idea of ‘basic liberties’ which include ‘the right to hold (personal) property’ or emphasis that justice should be fair (Rawls, 1971, 61). Thus property is useful to the owner because it allows him freedom of choice; but it is equally useful to others because it creates a predictable situation within which they may plan (Flanagan, 1979, 341). Rawls holds that “difference principle”, where inequalities are justified if they benefit the least advantaged. He also states that the right to own property is one of the basic liberties protected by the first principle of justice (Rawls, 1971).

For Rawls, no property exists prior to social institution; justifiable property rights and distribution of property must be tied with self-respect; and the products of national
talents are social assets (Munzer, 2001, 67). He identified that each one should have equal rights which expand the concept of justice, in which everyone should be arranged in such a manner so that no one would be deprived from benefiting opportunities. Further, he argues that marginal people should get equal rights including property rights and that justice should be termed ‘fairness’ in the society. The concept of liberal ideology gave birth to individualism, capitalism and stress upon market economy, which might benefit and transform human existence to better opportunities (Pocock, 1979, 142). On the other hand, Nozick’s sole book on political philosophy contains not only a critique of Rawl’s on justice, but also, and more importantly, a dazzling clever historical entitlement theory of justice (Nozick, 1974, 149-231).

2.2.2. LIBERTARIAN

Modern libertarianism, which came into existence from the beginning of the 1970s and is associated with the writings of Rothbard (1978, 1982b), Robert Nozick (1974), Schmidtz (1991), Narveson (1988), and others. They draw some of their ideas from classical liberalism, but not on all aspects. Libertarians regard a person’s natural right to freedom of choice and such a choice should be free of interference from other (Duncan, 2010). Like classical liberalism, modern libertarianism emphasises self-ownership, homesteading, and consensual transfer of property and states that human rights, including property rights, are inalienable rights (Fox, 2012, 20).

Libertarians, in the present sense, are ones who affirms the principle of self-ownership, which occupies a prominent place in the ideology of capitalism (Cohen and Grahm, 1990, 1). This principle is based upon the thought that every person is morally entitled to a full private ownership of property rights within his own powers. This means that each person has an extensive set of moral rights (which the law of his land may or may not recognise) over the use and fruits of his body and capacities. According to libertarians, individual’s ownership of rights would be violated when a government uses property for public purpose by building library or park, etc. (Duncan, 2010).
The idea of libertarian theory can also be traced back to the work of John Locke, who was the founder of liberalism in which he talked about natural rights of freedom of choice and favour of limited government policy. During the 20th century the idea of libertarian was developed in the work of Robert Nozick, *Anarchy, State, and Utopia* (1974), in which he developed his idea from John Locke and states that government is legitimate only to the degree that it promotes greater security for life, liberty, and property. However, he justifies that state should play minimal role in protecting the security of the people and the function of the state is just like a ‘night-watchman’ (Nozick, 1974, 25). “The state may not use its coercive apparatus for the purpose of getting some citizens to aid other, or in order to prohibit activities to people for their own good or protection” (ibid, Preface p. ix). Individual’s ownership of rights would be violated when a government uses property for public purpose by building library or park, etc.

Libertarians believe that the primary right is right to freedom and a right against coercion from others. The right to private ownership is seen as an essential element of freedom, consequently the right to property is implicitly related with right to liberty. The right to property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty (Gaus, 2002, 241). Scholars of liberals believe that property is a means of preserving liberty. Libertarians such as Robert Nozick emphasised upon property as one of the fundamental elements in a theory of respect for persons (Waldron, 1988, 15).

Robert Nozick argues for the theory of justice which made the justice of individual, appropriation-centric rather than distribution central and placed a conception of self-owning individual right-holders at the centre of the argument (Reeve, 1991, 97). Nozick and Rothbard disagree very sharply over the legal imposition restriction of the state; both adamantly believe in the idea of individual self-ownership. Both argues for it effectively by dismissing alternatives; if we do not own ourselves, others must have part-ownership of us, and we are the partially slaves of others people (Ryan, 2002b, 235). The state whose only purposes is to protect citizens against acts of coercion which includes
murder, assault, theft and so on, as a result, libertarians regard the modern welfare state to be illegitimate (Duncan, 2010).

The central attraction of libertarian theory advocates justice in terms of moral aspects. Robert Nozick’s famous version of theory of justice can be found in ‘entitlement theory’, in which distributive justice primarily consists of three principles- (i) the principle of justice is the original acquisition of holdings, (ii) the principle of justice in transfer of holdings and (iii) the principle of rectification for violations of (i) and (ii). According to Nozick, “the complete principle of distributive justice would be simply that a distribution is just if everyone is entitled to hold what they possess under the distribution” (Nozick, 1974, 151). Therefore, property rights would be one of the important aspects of distributive justice of an individual.

2.2.3. UTILITARIAN

The main exponents of the utilitarian theory are Jeremy Bentham, John Stuart Mill, Wilfredo Pareto and others. Utilitarian theory is basically individualistic in nature and assumes –rationality in the modern sense that individuals maximises utility or happiness (Solimano, 1998). Bentham defines property it as the “basis of expectation,” from which individuals can derive happiness from possessions.

Ironically, Bentham is dismissive about property rights as a natural right. In order to secure property, law and government must play significant role, in fact the “law creates expectation is a source of happiness, and also a potential source of unhappiness” (Ryan, 1984a, 98). As Jeremy Bentham famously stated, “property and law are born together, and die together. Before laws were made, there was no property, take away laws and property was ceases” (Bentham, 1975). He sees property from the point of legal bases and secondly, this right should be protected and preserved by law of any state.

According to Bentham, the right to property is the main way to achieve ‘greatest happiness in greatest numbers’. The possession of property by one man should not be interfered with the possession of property by another man, when this condition is not fulfilled property becomes the theft (Mahajan, 1988, 390). Property rights are justified in
general by the need for security, for making the consequences of action calculable, and for avoiding the frustrations that follow uncertainty and disappointment, certainly a limited conception of social security (Sabine and Thorson, 1973, 618). Utilitarians not only embrace the legal analyses of property rights but are also influenced by the economic analysis of law. Utilitarian argument for private property concerns the role of markets in promoting productive efficiency and social prosperity (Waldron, 1988, 9).

2.2.4. MARXIAN

Marxists theory views ‘private property’ not as a right of the individual, but as a condition which determines relations of production according to the stage of historical development (Gauba, 1981, 363). This theory was propounded by Karl Marx, Engels and other Marxist thinkers. Marxian proposed that private property has not existed from eternity like the state and it is not a natural right. The state was created by a class of property-owners in order to protect their private property. Therefore, it is an instrument of exploitation of the dependent class which does not own property.

Private property divided the society into two parts i.e. haves and have-nots, who assumed the positions of dominant and dependent classes, respectively. In ancient society, the division took between masters and slaves, and in the—medieval society, it was between the lords and serfs and in modern capitalist society, the bourgeoisie and the proletariat. The division was made under the capitalist. The proletariats are the property-less class and are completely dependent upon wage-labour. As a Marx and Engels, in their Communist Manifesto (1848), observed- “Property, in its present form, is based on the antagonism of capital and wage labour” (cited by Gauba, 1981, 364).

Private property is a divisive force, it is a source of conflict, not of harmony, it is a mode of exploitation and not cooperation. It denotes the means of production, because it is the mode of ownership of the means of production, which determines how the ‘have-nots’ will earn their livelihood. Marxism therefore, advocated the abolition of private property in this sense, not personal property.
Marxist thought that with the abolition of private property would lead to the end of exploitation. The abolition of private property does not imply abolition of property as such, it involves changing the pattern of ownership of property, from bourgeois ownership to proletariat ownership, from class ownership to common ownership.

2.3 PROPERTY INHERITANCE PRACTICES

Every society is guided by their own system of inheritance after the death of the owner. Each community has their own system of rules and regulation which is derived from a numerous norms and practices, as well as values. The law of inheritance is a body of rules and regulations which govern the transferring of assets and liabilities, after the death of heir. In this section, pattern of inheritance practices has been examined in different realms such as in religion, patrilineal, matrilineal and bilateral society. Lastly, the practice of property rights in customary and statutory laws is also fleshed out.

2.3.1. RELIGIONS

The religious laws are not the laws of a particular state, but it is based on the communities’ belief which can be universally applied among these communities (Mohsin, 2010, 196). These laws are mainly concerned with communities’ life-style which include succession, marriage, adoption, divorce, etc. and such laws independently operate from each other, such as, Hindu Law, Muslim, Christian law, etc. These religious laws are different from each other and do not constitute a family law, it can be grouped as family only because they are based on their religious faith (ibid). In regard to inheritance, many aspects of the ancient Indian, Japanese, Roman, Greek and Iranian laws also were objectionable and discriminating in nature⁹.

In primitive days, religion played a significant role in the development of legal property rights. Communities are guided by their own religious aspect with regard to property rights. Under Islamic law of inheritance, females have also right to inherit property with absolute power under the Holy Quran after the reformation. Such a right

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was provided to women at the same time when women in the rest of the countries were not even entitled to hold the property. Islamic law does not recognise the concept of community or joint family property as in Hindu laws, and it recognises absolute ownership (Mohsin, 2010, 62). It provides equal property rights between men and women, though it does not have the concept of stridhana or women’s estate.

Under ancient Hindu law, property can be divided into two kinds: joint family and separate property. Joint family property is one, which is ancestrally inherited by an heir or acquired without the aid of ancestral property (Sivaramya, 1970a, vii). The very nature of joint family property gives contentious preference to male members in the family. On the other hand, separate property or self acquired property is earned by individual’s skill and labour and owners have absolute control over it. Christian law is very fragmentary and essentially the public law of a particular society is made up by the Roman Catholic Church (Moshin, 2010, 199). The sources of Christian law can be found in Napoleon code and classical Roman law, in which individuals could have the right to ownership, to absolute and exclusive property. The concept of ownership of property was absent in the Christian world. Only in the 19th century, laws were made and females also enjoyed individual property rights, for example Married Women’s Property Act 1882 (ibid).

2.3. 2. PATRILINEAL

Women’s access to inheritance rights is often mediated through the patrilineal system in the patri-local societies. Under patrilineal system inheritance rights devolve from the male lineage to the male heir. In patriarchal societies, women do not own or have access to land and other forms of property. Land inheritance is through the male lineage and women can only have access to land through their husbands and sons (Munthali et al. 2003). In many traditional societies, in Sub-Saharan Africa, land use, housing, and the transfer of land and housing between generations is regulated by customary law, which largely excludes women from property ownership and inheritance (Richardson, 2004, 19).
Most of the African countries are influenced by patrilineal system of inheritance rights. For instance, Tswana in Botswana, where bloodlines and ancestry are traced through male relatives, a woman’s rights are more secure if she has an older son who is the heir to his father’s estate (ibid). Asiimwe’s article, *Statutory Law, Patriarchy and Inheritance: Home ownership among Widows in Uganda*, argues that Ugandan inheritance practices are patrilineal and under this, widows are denied property rights of her husband by the customary and statutory laws.

In some of the Latin American countries, patrilineal land inheritance system is common among the indigenous people, especially in Mexico (Deere and Magdalena, 2001a, 28). The main patrilineal societies in Ghana are the Ga tribe in Greater Accra region. Most of the South Asian countries (Dube, 1996) also practice patrilineal system of inheritance, such as parts of India and Bangladesh, Nepal and others.

The changing notion of property rights from communal ownership to private ownership is widely popular in most of the developing countries due to influx of population and their income-generation (Quisumbing et al. 2001; Otsuka, 2001). Further, its impact can be reflected in most of the South Asian countries’ pattern of land inheritance system, from matrilineal to patrilineal (Agarwal, 1996a). It also gave rise towards bilateral system of inheritance which can be found in Southeast Asia, e.g. in the Philippines (Estudillo et al. 2001). This can also lead the society to be more “egalitarian” in terms of inheritance system, because both sons and daughters inherit property from their parents (Otsuka, 2001). Hence, widows have no interest in both patrilineal and matrilineal system of inheritance, they are often left out without no assets because of a traditional presumption that they acquired during marriage with husband (Kutsoati and Randall, 2012, 2-3).

**2.3.3. MATRILINEAL**

Matrilineal is the system that defines lineages through female bloodlines, whilst “man’s children do not belong to his kin group and are not entitled to inherit his property” (Ferrara and Annamaria, 2012, 5). Morgan states that, matrilineal system was prevalent
before the origin of patriliny. Engel’s also describes that in the early primitive society, matrilineal system of inheritance was practiced on a common basis.

Gradually, the notion of private property came into existence with male dominance and matrilineal system faded under the shadow of the patrilineal system. It is still in practice by a few tribal communities, such as tribes of Northern Ghana (Akans), Bemba in Zambia, in India only small pockets of south and the northeast regions i.e., Nayars and Mappilies in Kerala, Garo and Khasi of Meghalaya (Das).

2.3.4. BILATERAL

Bilateral inheritance of property rights interestingly allows both sons and daughters to inherit parental property. The strongest evidence of bilateral inheritances practices can be illustrated from the Andean region of South America, Ecuador, Peru and Bolivia (Deere and Magdalena, 2001a, 20). Nangudi Vellares of Tamil Nadu State in South India also practice the bilateral inheritance system (Agarwal, 1996a, 83). Though, both sons and daughters inherit property, the preference would be given to son with respect to land inheritance system and the youngest son and daughter is favoured with the largest portion, with the expectation becoming the custodians of parent’s old age (Deere and Magdalena, 2001a, 21).

Inheritance rights always favoured men, even in the areas where bilateral system was supposed to be predominant: such pattern was supported by norm and practices of patrilocal and virilocal marital residence. In spite of carrying such loopholes, it has been argued that the system of matrilineal and bilateral inheritance of property rights advantaged many women in granting economic and social security (Agarwal, 1996a, 153).

2.3.5. CUSTOMARY PRACTICES VERSUS STATUTORY LAWS

Customs can be defined as the adoption of common practices and habits conveyed from one generation to the next and has becomes the rule of the particular community. When rules and regulation evolve with the community, such usages and customs are enmeshed
with communities identities. Customary property rights regimes are often referred to as non-formal or *de facto* systems, which have evolved in societies with the notion of local legitimacy (USAID, 2006, 9). It may be argued that customary laws is a mixture of various practices that have been inherited, observed, transmuted, learned and adopted (Knight, 2010, 3).

On the other hand, customary laws exhibit the characteristic of “flexibility”, in a sense that it developed with the changing behavior of economic, social and political environment (USAID, 2006, 17). The flexibility and local legitimacy features make it difficult to replace certain element, which is based on gender discrimination. Customary laws are challenged and it has weak point in many areas, including inheritance land system. It does not recognize a woman’s ability to own, inherit land and property ownership (Mennen, 2012; Benbih and Katz). In most of the developing nation, “90 % of land transactions are still governed by customary legal” (Knight, 2010), the decisions and techniques of interpretation of rules and regulations are legally binded under the customary practices. Legal initiatives are taken in order to eradicate gender-discrimination that often states fail to achieve.

The statutory system is defined in written laws (*de jure*) or formal laws enacted and enforced by a central or regional government (USAID, 2009, 9). Ownership of property and other natural resources are not only guaranteed in statutory laws, but also it’s a part of the customary laws of the indigenous communities. Knight argues that, the adoption of new administrative system of statutory laws which overrided the management process of customary laws, consequently, gave birth towards the implementation of customary rights and statutory laws (Knight, 2010, 4).

The continuous application of customary laws is incompatible with the legitimacy of statutory laws in the areas like inheritance, marriages, divorce, etc., for example, Hindu Succession Act 1956 (Amendment 2005) In India, women are allowed to become equal coparcener in the joint family. However, it also affronts the practices of customary laws of many communities. The Constitution of Kenya 2010 was modeled on the ground of gender equity, thus it “provides a platform for reconciling conflicts between customary
law and statutory law” (Kamau, 2005, 3). The Succession Act (Amendment) Decree No.22/1972 of Uganda, which guaranteed widow’s right to ownership in the matrimonial property (Assiimwe).

2.4 PROPERTY RIGHTS AND WOMEN EMPOWERMENT

The concept of property rights theories lies within the domain of socio-economic, political and legal, underpinnings. An individual can demarcate his or her property within the social system which is made up of families and communities. Then society plays a significant role in demarcating each role for safe-guarding the basic rights of an individual. The interdependence among the social, political, economic and legal is considered as fruitful in securing property rights.

2.4.1 ECONOMIC

In terms of economic perspective, property rights helps in two important levels: one in income-generation from agricultural production and another to combat financial instability and poverty crisis in the family. Ownership of property rights would empower women in economic strategy, possession itself would likely take credit from financial institutions. Further, with the help of financial security they would be engaged in political activities and even take part in decision-making process (Domingo, 2013, 8-9). Property right is the main ingredient in flourishing economic growth and development, which is an important model of The Golden Thread Narrative of the United Kingdom government. Similarly, secure property right is considered as pre-requisite in the growth of economic (Phillips, 2008, 2).

Ownership of land rights also empower women economically, for example, Gouthami and Rajgor’s (2008), study about women of Gujarat analysed that land entitlement in their own name would likely give them a sense of economic empowerment in terms of self-worth and sense of respect in the family and villages. It has been identified that women’s economic empowerment can be achieved through property rights. It confers direct economic benefits as key input into agricultural production, source of income from rental or sale, it enhances women’s livelihood options and can be
used as a collateral for credit: it is the heart of national and gender policies and address
direct entailment to social security benefits, child care in terms of divorce settlement
(UNDP, 1995; USAID, 2006; UNESCAP, 2013; Kelker and Maithreyi, 2013; Forsythe et
al, 2015; Kenney and Ana Paula, 2016).

2.4.2 SOCIAL

According to the social point of view, property rights enhance women’s status in
household as well as in community and can be helped in greater bargaining power within
the family (Scalise, 2011). Hence, property rights not only empower women
economically, but also empowers socially, in the family as well as in the society. The
entitlement of property helps to improve women’s role at home and outside and also
helps to improve the decision-making processes and powers.

The lack of decision-making authority and representation in property distribution
deteriorates the position of women (Bezabih and Holden, 2010; Sircar and Pal, 2014).
Women’s ownership of property is assumed to be the—means to bring changes in
ideology and the structures of patriarchy, within the family and in social relations
(Kelker, 2013, 3). Moreover, it enables women’s independent exercise against gender
discrimination and it also helps to improve social relations with the communities.

Land ownership strengthens women’s bargaining power in the market place,
especially the control over arable land and bestows upon her greater intra-household
collaboration power, along with allocation of household subsistence as compared to landless
women (Agarwal, 1996a; 1997b). The social norms or patrilineal or virilocal society
restrict women from ownership of independent land. Amartya Sen’s essay titled, Many
Faces of Gender Inequality, also highlights that in many societies ownership of property
is unequal and such type of inequality for women further make it harder to enter in
economic and social activities (Sen, 2001, 5).

However, women’s unpaid labour in the family cannot be counted as labour and
their family agricultural production is also managed by their husband or male members.
Allendorf’s study shows that those women who have control over land are likely decisive
in household matters and their children are assumed to be healthy and less malnourished (Allendorf, 2000). Land as a property not only improves women’s wellbeing but also impact the health of child, for it provides availability of nutritious food. Similarly, property rights over housing, provide shelter, dignity, and means for accumulation both for urban and rural poor people (Meinzen-Dick, 2009). Further, “Land is a crucial resource for poverty reduction, food security and rural development (FAO, 2016).

Property right appears to be a critical issue for women when the household breaks down, for example, in the case of male migration, war, abandonment, divorce, polygamous relationships, illness or death (USAID, 2006). It can also impact upon intra-household decision-making, income-generating and acquisition, and women’s overall role and position in the household and society (ibid).

2.4.3 POLITICAL

The holder of property ownership is effectively engaged in political environment (Domingo, 2013, 6). Property can be used in terms of credit that actually enhances the capacity to participate or compete for the positions of political power and representation (ibid, 8-9). When women are engaged in political process or activities, they can also contribute in the decision-making process. “Effective political support through the means of political leadership is necessary for economic development, on the other hand, secure property rights is a perquisite for economic growth” (Phillips, 2008, 2). Politically, ownership of property rights used as means securing and exercising political patronage and economically, it was considered as the medium of wealth-generation from land-based resources (ActionAid, 2013).

2.4.3 LEGAL

Legal positivist’s theory of property rights would argue that a person’s rights to property are determined and protected by the law (Fox, 2012). The idea of legal positivists was developed in 18th and 19th centuries by Jeremy Bentham and John Austin and later phase was contributed by the H.L.A. Hart. Obviously, legal property right is managed within the domain of the state legislative system. Ownership of property rights would bind
individuals through the network of legal rights, and under this, judicial mechanism can be performed on the basis of equal and transparent approach (Mercatus Center, 2008). Social practices and law should protect the rights of an individual in equal basis, the minority perceive state’s legitimate obligation as an instrument of justice. Law and economics scholars assume that “law is a manifestation of social policy” (Landes and Richard, 1987).

The UN Commission on the Legal Empowerment of the Poor, which looks at property rights on the legal bases, and states that it is one of the means of empowerment of an individual. They state that, “property rights help to establish clear ties of rights, obligations, responsibilities and recognition in a community” (UNDP, CLEP). Legal ownership of property would be identified as the recognition of women’s position and their sense of empowerment in the communities, or in the society. Further, the Report of Commission on the Legal Empowerment of Poor (CLEP-UN, 2008) reported that in most of the developing countries, rule of law with respect to equal property rights has not been functioning in smoothly and such situation is the root cause of poverty. In these countries women are still “disadvantaged in many statutory and customary land tenure systems” (GENDERNET, 2011; 2012).

CONCLUSION

The theory of property rights inculcates the liberty of an individual upon certain things. If an individual owns any property, he or she will have sovereign power upon the particular property. Land is a real property, which play significant roles in agriculture, shelter and denoting one’s identification. The genesis of property rights can be traced back to primitive society in which land was communally owned in a common manner. Gradually, the growth of human population encouraged agricultural activities and people started fencing their particular land which they had cultivated in the past.

The possession and ownership took the form of rights and it became necessary for the state to look after it. Various rules and regulation came into existence for the protection of communities’ rights. For instance, Greek, Roman, Common laws, Hindu
law, etc. was created on the bases of communities. Though, some of the laws are modified, but dominant numbers of communities are still guided by the same laws in spite of reformation.

The theory of property rights took evolution changes from ancient to modern era. Property rights changed its feature from common to private, and in the modern stage private property exhibits its prominent role. The notion of common ownership of property came with the idea of Plato. He was widely known as—functionalist specialist, in his ideal state which was divided into three classes i.e. guardian who serves the state, soldiers protects from the external aggressions and artisans who produce. Guardians, called as philosopher or rulers class were denied the ownership of property. If guardianship involved the ownership of private property it would not be a dedication of life to the state. They only meant for serving the state. However, communism applies only to the guardian class that is, to the soldiers and rulers, while the artisans are to be left in possession of their private families, both property and wives.

This theory of Plato was discarded by Aristotle, according to him, the institution of family, marriage and property are time-tested institution. They are all part of civilisation. Ending the institution of family, marriage and property will not be a progressive step; it will be going back to a stage when man was living a barbaric life. Thus family provides emotional security and it is within the means of primary socialisation. Aristotle was aware of the problem of concentration of wealth in the hands of few with the system of individual ownership. Here, he suggests a common use of such property. It means rich people can be taxed and their property can be used for a common purpose. Paradoxically, according to Aristotle, common property is the main element of conflict, in a sense that, those who work harder get less credit and those do not work harder get more money than they deserve. He suggests that private property endorsed the happiness and generosity by enabling people to do services for their friends and companions.

The notion of private property was developed among the Enlightenment thinkers, such as Hobbes, Rousseau, Locke and Kant. According to Rousseau, private property
creates inequality in the institution. With the development of property, self-interest and human ego emerged among the people. Man who possesses property harbours a superior feeling, over others who do not. In order to solve the problem, law and state should provide enough property for every individual so that even the poorest will become independent. Further, among them Locke’s theory of property stands in building the pillar of private property on the ground of natural rights.

The classical liberal’s states that property rights are pre-political which means that it exists prior to the formation of state, and therefore citizens form government and law in order to protect their rights. Liberal theory gives the concept of self-ownership of property. Private ownership of property rights and free society, goes hand-in-hand in the society. Similarly, under classical liberalism, the legitimacy of the state should be based on minimal. John Locke was individualist and ascribed to less interference from the other. An individual can become the owner of a property by mixing his labour with the particular property. So, the mixing of labour theory such as tilling and cultivating can be used as the product determines individual’s full ownership over a particular property.

Further, this liberal theory came into the form of libertarian in the work of Robert Nozick. He argues that primary right is right to freedom and a right against coercion from the other. He advocates justice in terms of moral aspects which can be found in his ‘entitlement theory’, which consists of three principles i.e. original acquisition of holdings, transfer of holdings and rectification for violations of acquisition and transfer of holdings.

In this context, according to Robert Nozick, the complete principle of distributive justice would be achieved when everyone is entitled to the holdings of what they possess. On the other hand, utilitarianism theory is based on the ethical aspects of modern welfare, economics and cost-benefits analysis. The principles of utilitarianism are often expressed by the phrase, ‘the greatest happiness of the greatest number.’ Bentham says that security of property right is a major condition in achieving the greatest happiness. He states that the main aim of law should be based on the equal distribution of property.
Marxist theory stands for the abolition of private property with the socialist property, which will lay the foundation of classless, stateless society. Private property creates class division among the have and have-nots. So, it needs to be abolished with a socialist revolution under the leadership of class-conscious workers. Proudhon also supported the condemnation of the institution of property, his view was ‘property is theft’. Property is theft in the sense that labour’s profit is enjoyed by the capitalist class, because the labour will not get—real profit. He states that property is a tool of exploitation of the weak by the stronger class.

Every society is guided by their own system of inheritance, for instance in patrilineal system, property is inherited by the sons, whereas in matrilineal, daughters are the sole heir. In the bilateral, interestingly, both son and daughters have equal inheritance system. In most of the bilateral society, ironically son preference is very common. Widows do not enjoy ownership of property in all these system, which shows the discrimination against women with respect to property. However, customary laws of different communities also discriminate women from benefiting their inheritance rights. Statutory laws are also there to protect the rights of women and various reforms are also implemented from state level to global level. The position of women is still unaffected in most of the areas especially in inheritance of property rights. In this context, effective initiatives need to be brought by state governments, civil society, non-governmental organisation, etc. from grass-root to global level.

The concept of property rights lie within the domain of socio-economic, political and legal underpinnings. The position of women would be identified with her ownership of property within the families and communities. However, the interdependence among the social, political, and legal aspects play significant roles in securing women’s property rights. Command over property rights give women their sense of empowerment in the society. Economically, it is considered as the medium of source of income from the land-based resources because property rights immensely help in the income-generation from the agricultural production. It can be also used as a collateral credit from the various financial institutions or governments, during financial and poverty crises in the family.
From the social perspective, property rights enhance women’s status in household, as well as, in the community. The entitlement of property would help improve women’s roles at home and in the community level which also encourages bargaining power and control over arable land. Those women who possess ownership of property would be recognised and respected by the society and it also enables women’s independent exercise. Similarly, property plays a significant role during the breaking of household, or male migration, divorce, polygamous relationship, illness, etc., in the family.

Politically, ownership of property rights is used as a means to engage in the political sphere. Property helps to take credit that actually enhances the capacity to engage in the political power and representation. When women participate in political representation, they would likely contribute in decision-making process, as well as, they can also involve in different land reform movements. Legal entitlement empowers more independence on the ground of discrimination. Legal positivists argue that a person’s property rights needs to be protected by the law on an equal basis. A property right from the legal basis is one of the means of empowerment of women, and legal ownership would be identified as the recognition of women’s position in the society.